

**FILED**

**MAR 23 2006**

**RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**PAUL MILLER, JR.,**

**No. C 04-04746 CRB (PR)**

**Petitioner,**

**ORDER DENYING PETITION FOR A  
WRIT OF HABEAS CORPUS**

**v.**

**DAVID L. RUNNELS, Warden,**

**Respondent.**

Petitioner was convicted by a jury in Contra Costa County Superior Court of assault on a police officer, exhibiting a firearm at a peace officer, and being an ex-felon in possession of a firearm. Various enhancements for prior convictions and firearm use were also found to be true. On December 14, 2001, he was sentenced to 35 years in state prison.

Petitioner appealed, contending that the trial court violated his Sixth and Fourteenth Amendment rights when it denied his motion to proceed pro per. On May 21, 2003, the California Court of Appeal affirmed the trial court's judgment; and on August 27, 2003, the Supreme Court of California denied review.

Having exhausted his remedies in the state courts, petitioner filed this habeas petition pursuant to 28 U.S.C. section 2254 on November 9, 2004. Petitioner alleges that the state court of appeal violated his constitutional rights by affirming the trial court's decision denying his motion to represent himself.

**BACKGROUND**

Petitioner was first charged by information in March 1997. Between March 1997 and November 1997, petitioner was represented by an appointed public defender. In November 1997, petitioner retained private counsel to replace the public defender. Petitioner's private counsel suffered a heart attack in late 1997. As a result, a public defender was once again assigned to represent petitioner.

In June 1998, on the last court day before trial was scheduled to begin, petitioner made a Marsden<sup>1</sup> motion, i.e., a motion to substitute counsel. At an in camera hearing, petitioner complained that his first attorney had not filed any motions, had waived time, and had only met with him once outside of court. Petitioner indicated that he was willing to go to trial with his second public defender, but wanted to know whether the weapons and fingerprint evidence against him could be challenged. The trial court determined that petitioner had failed to demonstrate that his attorney was incompetent, and denied the Marsden motion.

In September and October 1998, petitioner mailed two handwritten Marsden motions to the court. He delivered a final Marsden motion in December 1998, less than a week before his scheduled trial date, seeking to relieve his second public defender.

The trial court conducted an in camera hearing to determine the validity of the final Marsden motion. During the hearing petitioner asserted that he did not trust counsel's ability to provide him with adequate representation. He also told the court that "if he had to represent himself he would go pro-per." People v. Miller, No. A097516, 2003 Cal. App. Unpub. LEXIS 4951, at \*5 (Cal. Ct. App. May 21, 2003). The trial court once again denied the Marsden motion. Petitioner then stated that he wanted to "go pro per." Id. The trial court cautioned petitioner to think this over carefully and told him that he could raise the issue at the next scheduled hearing.

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<sup>1</sup>People v. Marsden, 2 Cal. 3d 118 (1970).

1 A week later in January 1999, on the last court day before trial was scheduled to  
2 begin, petitioner filed a Faretta<sup>2</sup> motion seeking permission to represent himself. At the  
3 hearing on the motion, petitioner conceded that he did not know the charges against him, and  
4 did not know what defense he would raise. He also conceded that he did not know the  
5 possible penalties he faced.

6 The trial court denied the Faretta motion. It noted that the motion could have been  
7 raised much sooner than it actually had been, but ultimately denied the motion because  
8 petitioner lacked the requisite knowledge and skill to conduct a competent defense.

9 Petitioner proceeded to trial represented by a public defender and was convicted and  
10 sentenced to 35 years in state prison. Petitioner appealed, claiming that the trial court's  
11 denial of his Faretta motion was based on an improper ground. The California Court of  
12 Appeal agreed, but nevertheless affirmed the trial court's judgment on the ground that it was  
13 correct insofar as petitioner's Faretta motion had not been timely raised.

## 14 DISCUSSION

### 15 I. Standard of Review

16 This court may entertain a petition for a writ of habeas corpus under the Antiterrorism  
17 and Effective Death Penalty Act of 1996 ("AEDPA") "in behalf of a person in custody  
18 pursuant to the judgment of a State court only on the ground that he is in custody in violation  
19 of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

20 The petition may not be granted with respect to any claim that was adjudicated on the  
21 merits in state court, unless the state court's adjudication of the claim: "(1) resulted in a  
22 decision that was contrary to, or involved an unreasonable application of, clearly established  
23 Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a  
24 decision that was based on an unreasonable determination of the facts in light of the evidence  
25 presented in the State court proceeding." Id. § 2254(d).

26 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state  
27 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of  
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<sup>2</sup>Faretta v. California, 422 U.S. 806 (1975).

1 law or if the state court decides a case differently than [the] Court has on a set of materially  
2 indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). “Under the  
3 ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court  
4 identifies the correct governing legal principle from [the] Court’s decisions but unreasonably  
5 applies that principle to the facts of the prisoner’s case.” Id. at 413.

6 “[A] federal habeas court may not issue the writ simply because that court concludes  
7 in its independent judgment that the relevant state-court decision applied clearly established  
8 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”  
9 Id. at 411. A federal habeas court making the “unreasonable application” inquiry should ask  
10 whether the state court’s application of clearly established federal law was “objectively  
11 unreasonable.” Id. at 409.

12 The only definitive sources of clearly established federal law under section 2254(d)  
13 are in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state  
14 court decision. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003) (citing Williams, 529  
15 U.S. at 412). “While circuit law may be ‘persuasive authority’ for purposes of determining  
16 whether a state court decision is an unreasonable application of Supreme Court law, only the  
17 Supreme Court’s holdings are binding on the state courts and only those holdings need be  
18 ‘reasonably’ applied.” Id.

19 In conducting a habeas review of a state court decision, a federal court looks to the  
20 last reasoned state-court proceeding. See Vann Lynn v. Farmon, 347 F.3d 735, 738 (9th Cir.  
21 2003).

## 22 II. Analysis

23 Petitioner claims that his Sixth and Fourteenth Amendment rights were violated when  
24 the state appellate court affirmed the trial court’s denial of his motion for self-representation.  
25 The issue for this court is whether the state appellate court’s denial of petitioner’s Faretta  
26 claim was contrary to, or involved an unreasonable application of, clearly established  
27 Supreme Court precedent, or involved an unreasonable determination of the facts. See 28  
28 U.S.C. § 2254(d).

A criminal defendant's right to proceed in propria persona was clearly established in Faretta v. California, 422 U.S. 806 (1975). In Faretta, the Court held that the Sixth Amendment creates a right of self-representation for defendants in state criminal proceedings. Id. at 819. However, the defendant's decision to represent himself and waive his right to counsel must be unequivocal, knowing and intelligent, timely, and not for purposes of securing delay. See id. at 835. The defendant must also be competent to waive the right to counsel. Godinez v. Moran, 509 U.S. 389, 396 (1993). In determining whether a defendant has validly invoked his right to self-representation, the trial judge cannot look to the quality of the representation that a defendant may provide for himself, so long as he knowingly and intelligently waives his right to counsel. McKaskle v. Wiggins, 465 U.S. 168, 173 (1984).

It is clearly established that the Court created a timing element in Faretta. See Moore v. Calderon, 108 F.3d 261, 265 (9th Cir. 1997) (stating that a timeliness element in a Faretta request is clearly established Federal law). The Court stated that Faretta's request was "well before the date of trial" and "weeks before trial." Faretta, 422 U.S. at 835.

However, the Court did not specifically define the contours of the timing element. The Ninth Circuit consequently has held that because the Supreme Court has not directly established when a Faretta motion is untimely, "other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." Marshall v. Taylor, 395 F.3d 1058, 1060 (9th Cir. 2005) (citing Williams v. Taylor, 529 U.S. 362, 412-13 (2000)).

Here, the California Court of Appeal based its decision on a number of California cases outlining the timeliness element under Faretta. It noted that a motion for self-representation is addressed to the sound discretion of the trial court and if made on the eve of trial may be found to be untimely. People v. Miller, No. A097516, 2003 Cal. App. Unpub. LEXIS 4951, at \*\*14-15 (Cal. Ct. App. May 21, 2003) (citing cases). The court explained that

[i]n analyzing the timeliness of such a motion the court should consider several factors including the quality of the counsel's representation, the

defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of the motion.

Id. at \*15 (citing People v. Scott, 91 Cal. App. 4th 1197, 1204-06 (2001); People v. Windham, 19 Cal. 3d 121, 128 (1977)). The court also noted that "the fact that a defendant made earlier Marsden motions that were denied also suggests that he or she had sufficient opportunity to raise the issue of self-representation in a more timely manner. Id. (citing Scott, 91 Cal. App. 4th at 1205-06).

The court of appeal applied the pertinent factors and concluded that, under the circumstances of the case, the motion was untimely. The court found that petitioner's "experienced counsel was representing him adequately, both before the Faretta motion was made and after the subsequent trial." Id. at \*16. Petitioner had already had three attorneys at the time he moved to represent himself, and his decision to represent himself was in response to the denial of his Marsden motion. Id. Importantly, the court found that petitioner had made an oral Faretta motion a week before filing it with the court, that trial on the underlying charges was scheduled to begin on the next court day after petitioner filed the motion and the motion was heard, and that trial actually began on the following court day. Id. The court concluded:

There is no doubt that a continuance of trial with its attendant disruption would have been required to allow Miller – a defendant who admitted on the eve of trial that he did not know the charges pending against him, the evidence that could be used to prove or disprove those charges, what defenses he could use and the maximum penalty he faced – to prepare to represent himself at trial. We also note that Miller's first Marsden motion was denied in early June 1998. His attorney at the time had represented him since late December 1997. Thus, [Miller] had an ample opportunity to evaluate his trial counsel and to raise a more timely motion for self-representation before his motion of December [1998] and January [1999].

Consideration of all these factors supports our conclusion that the Faretta motion was untimely.

Id. at \*17 (citations omitted).

As stated above, there is no clear Supreme Court precedent which defines the timeliness element. Marshall, 395 F.3d at 1060. The only certainty is that a motion filed

1 “weeks before trial” must be considered timely. Here, petitioner’s motion was not filed  
2 “weeks before trial,” and none of the factors employed by the California Court of Appeal  
3 abrogate or conflict with the “weeks before trial” standard set forth in Faretta. The  
4 California Court of Appeal primarily based its conclusion that the motion was untimely on  
5 the motion’s temporal proximity to the start of trial—one week before trial. It also considered  
6 the fact that trial had already been delayed a number of times and that petitioner had had  
7 ample opportunity to raise the motion earlier. It simply cannot be said that the state court of  
8 appeal’s determination was contrary to, or involved an unreasonable application of, clearly  
9 established Supreme Court precedent. See 28 U.S.C. § 2254(d); Marshall, 395 F.3d at 1060.

10 The state appellate court’s determination that the motion was untimely is also clearly  
11 supported by the record. After all, the trial court itself expressed concern with the timing of  
12 the motion. See People v. Miller, No. A097516, 2003 Cal. App. Unpub. LEXIS 4951, at \*7  
13 (Cal. Ct. App. May 21, 2003) (noting that trial court had noted that the motion had been  
14 made a week earlier, shortly before trial and that petitioner could have brought the request  
15 much sooner.). This is not a case where “nothing in the record suggests that the trial court  
16 would have denied the motion on timeliness grounds had it believed that petitioner was  
17 competent to represent himself.” Vann Lynn v. Farmon, 347 F.3d 735, 741 (9th Cir. 2003).

18 Finally, petitioner’s contention that the California Court of Appeal improperly  
19 affirmed on a basis not explicitly relied upon by the trial court is without merit. The Ninth  
20 Circuit has made clear that the California Court of Appeal is “free to affirm the trial court on  
21 any basis supported by the record.” Marshall, 395 F.3d at 1061; accord Hamilton v. Goose,  
22 28 F.3d 859, 862 n.3 (8th Cir. 1994) (noting that where the “state court record fairly  
23 supported the [appellate court’s] finding that [defendant] did not unequivocally invoke his  
24 right to represent himself,” it did not matter that in denying the Faretta request, the trial court  
25 judge “expressed his concerns about [defendant’s] ability to represent himself”).

26 Petitioner is not entitled to federal habeas relief on his Faretta claim. The California  
27 Court of Appeal’s decision rejecting petitioner’s claim was not contrary to, or involved an  
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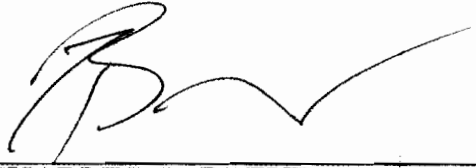
1 unreasonable application of, clearly established Supreme Court precedent, or was based on  
2 an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

3 **CONCLUSION**

4 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The  
5 clerk shall enter judgment in favor of respondent and close the file.

6 **IT IS SO ORDERED.**

7  
8 Dated: March 23, 2006

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10 **CHARLES R. BREYER**  
11 **UNITED STATES DISTRICT JUDGE**

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

MILLER,

Plaintiff,

v.

RUNNELS et al,

Defendant.

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Case Number: CV04-04746 CRB

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 23, 2006, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: March 23, 2006

Richard W. Wieking, Clerk  
By: Barbara Espinoza, Deputy Clerk